No. 18-15

In the

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *Garco Const., Inc. v. Speer*, 138 S.Ct. 1052 (2018) (certiorari denied); *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); and *Christopher v. SmithKline Beecham*, 567 U.S. 2156 (2012).

SUMMARY OF ARGUMENT

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and solidified in *Auer v. Robbins*, 519 U.S. 452 (1997), has proved to be a violation of core separation of powers principles. It exacerbates the problem of delegation of lawmaking powers to unelected executive officials, already at the constitutional breaking point under step two of the *Chevron* doctrine, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

U.S. 837 (1984). It also deprives the judiciary of its authority to interpret the laws, an authority that has been recognized for over two hundred years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Several members of this Court have in recent years acknowledged the constitutional problems with the *Auer* deference doctrine, and this case is a good vehicle to reconsider and overrule it.

REASONS FOR GRANTING THE WRIT

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty.

Several members of this Court have recently recognized the risk posed to the Constitution's core separation of power principles by various doctrines of deference to the unelected federal bureaucracy. *Auer* deference should be on its "last gasp." *Garco Const., Inc.*, 138 S.Ct. at 1053 (Thomas, J. dissenting from denial cert.); *United Student Aid Funds, Inc. v. Bible*, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of cert.). Even the author of the opinion that gave its name to the doctrine announced that he had abandoned the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer v. Robbins*, 519 U.S. 452 (1997), that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)); Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96

Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine [*Auer*'s predecessor] may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

There is good reason for this willingness to reconsider *Auer*. The rule announced in *Seminole Rock* and confirmed in *Auer* is a direct attack on the principle of separation of powers. This structural feature of the federal constitution—considered vital by the Framers and Ratifiers—is the feature that best preserves liberty.

Separation of the powers of government is a foundational principle of our constitutional system. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein

& Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67 ; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.* Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

II. *Seminole Rock* and *Auer* Deference Violate Separation of Powers.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). The judiciary cannot abdicate its constitutional responsibility to interpret the law.

United States v. Nixon. 418 U.S. 683, 704 (1974) ("[T]he judicial power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The deference shown under *Seminole Rock* and *Auer*, however, does just that by ceding judicial power to the executive. This allows the concentration of power feared by the founding generation. *See* Manning at 674-75. As Professor Manning notes, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield out-sized influence on the agency. *Id.* at 675.

Congress may be able to delegate part of its law-making function to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).[2] The purpose in doing this is to allow an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency

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[2] This should be distinguished from deferring to administrative diktats that the statutory text means one thing on one day, and something completely different on another day. *Compare National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 973 (2005) (upholding FCC determination that broadband internet providers were computer service providers rather than telecommunication providers under the Telecommunications Act of 1996) *with United States Telecom Ass'n v. FCC*, 825 F.3d 674, 695 (D.C. Cir. 2016) (upholding FCCs new ruling that broadband internet providers are now telecommunications providers rather than computer services providers – under the same statutory scheme) (petition for writ of certiorari pending, *Berninger v. FCC*, No. 17-498).

has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *State Farm*, 463 U.S. at 42; *Fox Television Stations*, 556 U.S. at 514-15.

The power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the executive.

From the early days of the republic, this Court has agreed that the courts have both the power and duty to interpret the law. Most famously in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), this Court declared "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Later cases have relied on these principles to reject a call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret the laws to

the Executive. See *United States v. Nixon*, 418 U.S. 683, 704 (1974).

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. Federalist 51, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to exercise that power. *Marbury*, 5 U.S. at 177. In order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Bk 1 § 2, at 58 The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

Chevron deference, when applied to an agency, using its specialized expertise, to merely fill a gap in the Congressional scheme, does not raise the same concerns for separation of powers present here. Under this original purpose of *Chevron* deference, the Court does not cede its power to interpret the law. Instead, the Court recognizes that Congress gives agencies clear policy guidance and then relies on those agencies to employ their specialized expertise (such as what level of exposure to a particular chemical is harmful) to fill in gaps in the legislative scheme. Until the agency has filled in those gaps in, the statute may not yet be complete in the sense that specialized expertise must be brought to bear on the problems that Congress sought to address. This use of agency expertise

by Congress to fill in details in the regulatory scheme is not a part of the judicial function.

Once the agency has issued a regulation that carries the force of law, however, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." Federalist 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the process to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative tools. Yet the job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

CONCLUSION

Several members of this Court have already acknowledged the significant separation of powers problems that result from the increasingly broad reliance on deference doctrines by the unelected administrative bureaucracy. As the Chief Justice noted, the issue of *Auer* deference "is a basic one going to the heart of Administrative Law." *Decker*, 568 U.S. at

1339 (Roberts, C.J., concurring). The petition for writ of certiorari should be granted so that this Court can answer this basic question and restore the separation of powers principles that lie at the core of our constitutional system of government.

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